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COMMISSION ON HUMAN RIGHTS

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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Draft optional protocol to the International Covenant on Economic,
Social and Cultural Rights

Report of the High Commissioner for Human Rights

Introduction

1. At its fifty-second session, the Commission on Human Rights took note of the measures taken by the Committee on Economic, Social and Cultural Rights towards the elaboration of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights granting the right of individuals or groups to submit communications concerning non-compliance with the Covenant, as recommended by the World Conference on Human Rights, and requested the Committee to submit a report on the matter to its fifty-third session (resolution 1996/16, para. 10).

2. The Committee on Economic, Social and Cultural Rights continued and concluded its consideration of a draft optional protocol at its fifteenth session (E/C.12/1996/SR.44-49 and 54). The report of the Committee on Economic, Social and Cultural Rights on a draft optional protocol for the consideration of communications in relation to the International Covenant on Economic, Social and Cultural Rights (E/CN.4/1997/105, annex) was submitted to and considered by the Commission on Human Rights at its fifty-third session in 1997.

3. Pursuant to requests by the Commission on Human Rights in decision 1997/104 and resolution 1998/33, comments were requested from Member States, States parties to the Covenant, intergovernmental organizations and non-governmental organizations. Comments received have been published in Commission on Human Rights documents E/CN.4/1998/84 and Add 1 (fifty-fourth session), and E/CN.4/1999/112 and Add 1 (fifty-fifth session)

4. On the basis of Commission on Human Rights decision 1997/104, comments have been received from the following States: Canada, Cyprus, Ecuador, Finland, Germany and the Syrian Arab Republic. Cyprus, Ecuador, Finland and the Syrian Arab Republic expressed support for the draft optional protocol. Comments were submitted by the following United Nations organs and intergovernmental organizations: Office of the Legal Counsel of the United Nations, and the Directorate of Human Rights of the Council of Europe. Both organizations expressed their support for the draft optional protocol. The following non-governmental organizations submitted comments: American Association of Jurists, International Commission of Jurists (Dutch section), International Commission of Jurists, International Organization for the Development of Freedom of Education and the International Council of Environmental Law. All the NGOs strongly endorsed the draft optional protocol (see E/CN.4/1998/84 and Add 1).

5. On the basis of Commission on Human Rights resolution 1998/33, comments have been received from the following States: Croatia, Cyprus, Finland, Germany, Mexico and Sweden. Croatia, Mexico and Germany expressed their support for the draft optional protocol. The following NGO, International Centre for Sociological, Penal and Penitentiary Research and Studies at Messina, Italy, submitted comments and expressed its support for the draft optional protocol (see E/CN.4/1999/112 and Add 1 and the present document).

6. In its resolution 1999/25, the Commission on Human Rights requested the High Commissioner to urge all States to submit their comments on the report of the Committee on Economic, Social and Cultural Rights to the Commission on a draft optional protocol for the consideration of communications in relation to the Covenant and, taking into account the comments received, to report to the Commission at its fifty-sixth session on options relating to the proposal for a draft optional protocol. Pursuant to this decision, a note verbale was sent by the Secretariat on 13 August 1999 to all Member States. By 10 December 1999, replies had been received from: Czech Republic, Georgia, Lebanon, Lithuania and the Syrian Arab Republic. The comments received in 1999 are contained in the present document. In addition, a submission was received from Germany pursuant to resolution 1998/33. Any additional replies will be reproduced in an addendum to this document.

I. COMMENTS RECEIVED

Czech Republic

[Original: English]

[7 December 1999]

Questions of terminology

7. The Czech Republic considers the reference to a "failure to ensure the satisfactory application of a provision of the Covenant" more appropriate than the phrase "violation ... of ... the rights set forth in the International Covenant" used in the Optional Protocol to the International Covenant on Civil and Political Rights. The different character of the rights contained in the International Covenant on Economic, Social and Cultural Rights is reflected in the way the State obligations are determined in both Covenants: while the International Covenant on Civil and Political Rights states in article 2, paragraph 1, that "each State party ... undertakes to respect and ensure ... the rights", article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights provides that "Each State party ... undertakes to take steps ... to the maximum of available resources, with a view to achieving progressively the full realization of the rights recognized ...". Therefore, the obligations that are laid down in different forms in each of the Covenants should be referred to in different wording in each optional protocol.

Individuals and/or groups as complainants

8. The Czech Republic would prefer that article 1 of an optional protocol contain a restrictive list of groups that may submit a communication to the Committee. A precise determination of the potential group of complainants is of great importance if an optional protocol is to allow third parties also to submit a communication on behalf of alleged victims. The Committee itself is of the opinion that such possibility should only "embrace individuals and groups who ... are acting with the knowledge and agreement of the alleged victim(s)" (E/CN.4/1997/105, annex, para. 23). In case any group is entitled to submit a communication as a victim of violation of its rights, and it is possible to submit a communication on behalf of such allegedly injured group, it may, in some cases, become difficult or even impossible to determine whether such "group victim" is aware of the communication and agrees with it.

Right to submit a communication - third parties acting on behalf of alleged victims

9. The Czech Republic suggests that the condition stating that a submission on behalf of an alleged victim is only allowed "with the knowledge and agreement of the alleged victim" be included explicitly in the text of an optional protocol instead of being left to the Committee's interpretation. The explicit provision will facilitate the elimination of abuses of the communication procedure by third parties.

Receivability and admissibility

10. The Czech Republic suggests that the closing sentence of the proposed article 3, paragraph 3 (b) be deleted. Admissibility of the claim when the procedure of investigation or settlement is unreasonably prolonged is in place when applied to exhaustion of domestic remedies, as is the case in article 5, paragraph 2 (b), of the Optional Protocol to the International Covenant on Civil and Political Rights. Its application to another parallel ongoing investigation or settlement at the international level would constitute an unacceptable clash of competencies and a violation of the commonly accepted legal principle *ne bis in idem*. Moreover, it is unlikely that the provision of the unreasonable prolongation of another international procedure would be used in practice for the same reasons as the Committee itself gives in its argumentation against inclusion of an inter-State complaint procedure in an optional protocol.

Georgia

[Original: English]
[25 October 1999]

11. The Government of Georgia considers that granting of individuals or groups the right to submit communications concerning non-compliance with the Covenant is a logical step since such communications procedures exist under United Nations human rights treaties and particularly the first Optional Protocol to the International Covenant on Civil and Political Rights.

12. The aspect that under an optional procedure the State party concerned retains the final decision as to what will be done in response to any views adopted by the Committee is acceptable for our State.

13. We consider that discussion on the inclusion of an inter-State complaints procedure within the proposed optional protocol should be continued. The International Covenant on Economic, Social and Cultural Rights is a document which involves mainly inter-State relationships, and such a procedure is included in the International Covenant on Civil and Political Rights.

14. We welcome the inclusion of an individual right to petition as essential and that the Committee had indicated a "strong and clear preference for an individual" focus (*ibid*, para. 19). The competence of the Committee to receive and examine communications from groups is also acceptable. As to third parties acting "on behalf of" alleged person, their inclusion we think demands more thorough consideration because there are examples of misuse of such a right.

15. Paragraph 1 of article 2 from our point of view should exclude the right to self-determination or precisely emphasize that the right to self-determination should be dealt with only if economic, social and cultural rights are involved. We fear that the inclusion of self-determination would pose a grave danger of the procedure being misused.

16. The proposed texts of articles 3, 4 and 5 are acceptable.

17. A six month time limit in the proposed text of article 6, paragraph 2, is acceptable. Of course, three months would be too short a time for Governments to respond.
18. In the proposed text of article 7, we consider that paragraph 1 would make it very difficult to examine the communications and opens the way to its misuse. We therefore consider it desirable to delete paragraph 1 of article 7.
19. The proposed texts of articles 8-17 are acceptable.

Germany

[Original: English]
[11 November 1998]

20. The Government of Germany believes that, as a matter of principle, the availability of individual complaints procedures is an apt way of strengthening the legal status of those involved, as well as their awareness of their rights, and of encouraging States parties to implement their obligations. In this context it is primarily the task of the States parties to guarantee national compliance with international law and with relevant national provisions, inter alia through an independent judiciary. International legal protection for individuals can be an important additional element. Despite their regrettable lack of resources and the limitations this entails, the existing international procedures for individual legal protection have proven their worth as vital components of international human rights protection.
21. If a complaint mechanism relating to economic, social and cultural rights is to function efficiently, it is essential that the precise context of the regulations and obligations emanating from these rights, as well as the entitlement to complain, be clarified. In Germany's view there are still deficits or uncertainties in this area which should be cleared up (cf. inter alia Germany's earlier position in document E/CN.4/1998/84). In this connection Germany is pleased to have witnessed some developments in the right direction, in particular the decision by the Commission on Human Rights at its fifty-fourth session to appoint a special rapporteur whose mandate will focus on the right to education (resolution 1998/33), as well as various approaches in the Committee on Economic, Social and Cultural Rights and in the academic world (including the panel of experts organized by the United Nations High Commissioner for Human Rights on 25 March 1998 at the beginning of the fifty-fourth session of the Commission on Human Rights). This conceptual work must be continued.
22. Germany looks forward with interest to further discussion of these issues in the relevant United Nations forums.

Lebanon

[Original: French]
[19 November 1999]

23. The Ministry proposes that the preamble should include a new paragraph reflecting and confirming the relationship between the realization of development and the realization of the other Covenant rights.

24. The protocol does not specify the identity of the individuals or groups who may lodge a complaint. In addition, the Ministry considers that this right should be strictly limited to the victims of violations or their legal representatives in order to simplify and clarify the Committee's work.

25. The Ministry agrees with the substance of article 3, but asks the following question: how is the Committee to establish clearly that all the procedural formalities have been complied with? In addition, paragraph 1 of article 3 should be drafted in such a way as to avert any duplication between the mechanisms provided for by the protocol.

26. As to draft article 7, the Ministry would have no objection to the Committee accepting information from different sources, i.e. sources other than the parties concerned by the complaint, provided that the parties are informed and the sources are not directly involved in the complaint in question. It is also necessary to specify the procedures which the Committee should comply with in order to check facts and allegations in the context of current discussions.

27. The Ministry endorses the explanation concerning article 8, in which it is stated that the Committee must not be transformed into a judicial body and that these procedures must remain in the context of recommendations. The Ministry accordingly considers that this approach should be spelled out in the provisions of this article.

Lithuania

[Original: English]
[3 November 1999]

28. The Government of Lithuania supports the draft optional protocol establishing an optional communications procedure for the International Covenant on Economic, Social and Cultural Rights.

29. Lithuania supports the Committee's recommendation that the protocol should refer to a "violation ... of ... the rights set forth in the International Covenant". Lithuania also supports the opinion that the right to submit communications should be granted to individuals as well as groups claiming to be a victim of a violation. However, we question the extension of the right to submit communications to "third parties" who merely have "sufficient interest" in the matter, as this potentially could cause an overflow of speculative complaints.

30. Lithuania supports the proposal of the Committee that all rights set forth in articles 1 to 15 could be covered by the procedure. However, it should be noted that the right to self-determination, provided for in article 1, should be dealt with under this protocol only insofar as economic, social and cultural rights are concerned.

Syrian Arab Republic

[Original: Arabic]
[22 October 1999]

31. In a letter received on 22 October 1999, the Permanent Mission of the Syrian Arab Republic to the United Nations Office at Geneva indicated that the issue is being considered, and that the Government would like to submit its comments on the draft optional protocol during the fifty-sixth session of the Commission on Human Rights.

II. OPTIONS REGARDING THE DRAFT OPTIONAL PROTOCOL
TO THE INTERNATIONAL COVENANT ON ECONOMIC,
SOCIAL AND CULTURAL RIGHTS

32. The comments received from States and intergovernmental and non-governmental organizations since 1997 give rise to the following options:

(a) Request for additional comments from States and other interested parties. In view of the limited number of replies received from States regarding the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, one option may be for the Commission on Human Rights to decide that yet another request for comments should be made to States, United Nations organs, intergovernmental organizations and non-governmental organizations that have not yet submitted replies,

(b) Further study by an open-ended working group. The comments received, both positive and sceptical, encompass a wide range of views. A considerable number of suggestions and proposals have been made regarding the provisions of the draft optional protocol and further discussion of the text has been welcomed in various replies received from States. Therefore, one option might be for the Commission to decide that, in light of the nature of the views set forth in the comments received and of the suggestions and proposals regarding the draft, further consideration and study of the matter is required before any conclusions can be reached,

(c) Discussion and eventual adoption of the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights by the Commission. Of the 14 States which have replied, 11 are in support of the draft optional protocol and propose amendments to the formulation and substance of the draft. Three States have expressed their doubts about the draft optional protocol. One of them, however, seems to have changed its initial point of view to a more supportive one with respect to the consideration of a draft optional protocol. The United Nations bodies and intergovernmental organizations that have submitted comments have welcomed and expressed support for the elaboration of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, and have made suggestions on the formulation and substance of the draft. The comments received from

non-governmental organizations, both in written form and in oral statements, support the draft optional protocol, and include remarks and suggestions on the formulation and substance of the draft. A workshop held in February 1999 on the draft optional protocol organized by the International Commission of Jurists under the auspices of and in cooperation with the Office of the High Commissioner for Human Rights, supported continuing work on the further elaboration of the optional protocol. A number of areas were identified which would need further clarification, such as the practical consequences and requirements of a new complaint mechanism in the United Nations human rights system, and the justiciability and violations of economic, social and cultural rights. A third option might therefore be for the Commission on Human Rights to decide that, on the basis of the report of the Committee on Economic, Social and Cultural Rights to the Commission and on the basis of the comments received, the draft optional protocol may be discussed with a view to its being adopted.
